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No. 515

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

UNION RAILWAY COMPANY,
Petitioner,

vs.

J. R. COBB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment entered in this cause on the 24th day of May, 1963, and an order denying petition to rehear entered on the 16th day of July, 1963.

OPINIONS BELOW.

The Opinion of the Court of Appeals dated May 24, 1963, which is not reported, is appended hereto as Appendix No. 1, and the Order Denying Petition for Rehearing, dated July 16, 1963, which is not reported, is appended as Appendix No. 2.

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

QUESTION PRESENTED.

1. In this case where the Plaintiff-Respondent alleged that his injury was proximately caused by failure of automatic couplers to couple automatically by impact and wherein there was no proof that the couplers prior to the alleged "impact" were properly set, was it error for the Court to instruct the jury as follows:

> "The Court further charges you that if couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically on impact, you may infer from that fact but you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act."

STATEMENT OF THE CASE.

This is an action brought under the provisions of the Federal Safety Appliances Act, 45 U. S. C., § 2, and under the Federal Employers' Liability Act, 45 U. S. C., § 51 et seq.

The respondent, J. R. Cobb, at the time of the events discussed herein, was employed in the capacity of "Yardmaster" (19a,* 24a-25a) by the petitioner, the Union Railway Company, a corporation authorized to do business in Tennessee, with offices in the City of Memphis, Tennessee. At all times herein mentioned, the petitioner owned and operated in Interstate Commerce, as a common carrier, a railroad, and the respondent was employed by the petitioner in such commerce.

On or about May 11, 1960, the respondent herein was injured by a fall from the top of a boxcar that was standing at the end of a cut of cars on a "dead end" spur track, located just north of Olive Street in the City of Memphis. The spur track is commonly known as "Whiskey Track," and runs in a curving northeasterly direction from a main line track, on which the petitioner railroad operates its trains. At the time in question herein, the said "Whiskey Track" was being used for storage, and approximately ten cars (25a, 26a, 27a, 28a, 45a, 61a, 62a, 71a, 78a) were standing on said track. The car from which the respondent herein fell was the last car of these ten standing upon "Whiskey Track," that is to say, it was the car nearest to the dead end of the spur track and most distant from the junction of the said "Whiskey Track" with the main line track (20a).

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* This and succeeding references are to pages of Appellant's Appendix.

At all times material hereto, as has been stated, the respondent was employed in the capacity of "Yardmaster," and as such, it was his duty to supervise generally the switching operations being conducted at Parkway Yard in Memphis, Tennessee. As such, he was not a member of the switching crew and generally was not expected to participate actively in switching operations, e. g., throwing switches, giving signals, etc. (34a, 35a, 43a, 44a).

Sometime prior to the accident involved herein, the respondent, J. R. Cobb, noticed that the brake upon the last car of the ten cars sitting in "Whiskey Track" was set. Just prior to the accident, realizing that the switching crew intended to remove the last two cars from the ten cars stored in "Whiskey Track" and switch them to another point in the railroad yard, the respondent decided to release the brake on the last car of these ten himself, although he did not usually actively engage in switching operations (45a, 46a, 48a, 51a, 60a, 61a, 67a, 73a). The respondent made the decision to release the brake while out of sight of the switching crew (28a, 30a, 31a). He had not said anything to any of the switchmen about the said brake (31a), and testified that the crew had no way of knowing that he intended to release the brake (30a, 31a). The crew did not expect the respondent to be participating actively in this or any other switching movement (51a, 52a).

In the meantime, the switching crew had run the switch engine down the main track preparatory to moving into "Whiskey Track" to pick up the ten cars stored therein. The crew moved the engine (with no cars attached) into "Whiskey Track" and made contact very lightly (21a) with the lead car in "Whiskey Track". The couple between the switch engine and the lead car made successfully on the first contact (66a, 69a, 75a). At this point,

the respondent, who was holding on to a grabiron on the tenth or last car of the ten cars sitting on "Whiskey Track", felt the vibration and assumed that the engine had coupled to all ten cars (20a, 22a, 23a). Acting on this assumption, he then climbed up on top of the rear car and released the brake. In fact, however, the switching crew then pulled out of "Whiskey Track" and discovered that they had only eight cars of the ten sitting in "Whiskey Track," leaving the two last cars behind (49a, 50a, 52a, 53a, 55a, 62a, 63a, 69a, 71a, 75a, 76a).

The crew discovered that they only had eight cars as the switch engine and the cut of cars behind it pulled out of the "Whiskey Track." They then proceeded, for a second time, into "Whiskey Track" to pick up the remaining two cars, at which time the train, with eight cars being shoved by the engine, made contact with the last two cars, the couple being made successfully with no difficulty (53a, 54a, 55a, 63a, 64a, 66a, 70a, 75a, 76a). At the time the switching crew made this second trip and made contact with the last two cars, the respondent was proceeding to climb down from the top of the rear car, having released the brake, and upon this second contact was knocked off of the car, sustaining the injuries involved in this suit (24a).

On trial of this case there was no proof as to whether any of the knuckles in any of the couplers involved in both of the successful coupling attempts involved in this case were open or closed. In fact, the only proof in the record dealing with the opening of couplers at all was a statement by a number of the crew members that they did not recall whether the couplers were open or closed in either of the successful couples referred to herein (53a, 64a, 65a, 66a, 76a).

The District Court submitted the case to the jury on a charge permitting a finding of violation of the Safety

Appliances Act, and also permitting a finding of negligence under the Federal Employers' Liability Act, having overruled petitioner's motion for a directed verdict on both grounds (38a, 40a, 79a).

Prior to the charge, the petitioner submitted a number of special requests, all of which either were denied or withdrawn. An appeal was prosecuted because of the denial of two of these special requests (98a, 99a, 100a, 101a), and because of a portion of the court's charge specifically dealing with the Safety Appliances Act (81a, 82a) to which the petitioner duly objected (96a, 98a). This portion of the charge is set forth above under the caption "Question Presented".

There followed a judgment on a verdict of the jury for the respondent to recover $45,000.00 and costs. The petitioner filed a motion for a new trial, which was overruled by the trial Judge, after which the petitioner filed its notice of appeal to the Circuit Court of Appeals for the Sixth Circuit and perfected same in accordance with the rules of that Court.

OPINION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the judgment of the District Court, relying principally upon the cases of **Affolder v. The N. Y. C. & St. L. R. R.**, 339 U. S. 96 (1950); **Southern Ry. Co. v. Stewart**, 119 F. 2d 85 (C. A. 8). Petitioner respectfully submits that the Court of Appeals misconstrued the law of these two cases as applied to the facts of the instant case, and in so doing, affirmed a jury verdict which, as petitioner insists, was based upon a charge of the Court containing prejudicial error. In brief, petitioner would point out that in the **Affolder** case it abundantly appears from the wording of the several opinions that there was ample proof that the knucklers in question

were set for coupling, whereas in the instant case there is a complete lack of proof on this essential point. The **Stewart** case, it is respectfully submitted, is not authority for the proposition in support of which it was cited. Petitioner submits that the **Stewart** case is, on the contrary, authority for the proposition that a violation in the act is not shown merely by proof that the cars failed to couple automatically by impact, but that there also must be a showing that they failed "upon a fair trial", that is to say, in a situation in which they were set to couple. The language of the Court of Appeals in the **Stewart** case on this point is as follows:

> "It is generally held that a violation of the statute is shown by proof that cars upon a fair trial failed to couple automatically by impact."

These cases are described more fully in the attached brief.

Petitioner avers that the charge of the District Court, as approved by the Court of Appeals, permitted the jury to found its decision upon a violation of the Safety Appliance Act, thereby disregarding mitigation of damages as a result of the contributory negligence of the respondent, which is shown by the record to be considerable. It is earnestly urged that the granting of a Writ of Certiorari is proper and necessary in this case in order that the applicable law, as heretofore enunciated by this Honorable Court, may be properly applied to the present case to the end that petitioner may be granted appropriate relief in the form of a new trial governed by a charge of the District Court in conformity with the applicable law and the facts of the case.

BRIEF AND ARGUMENT.

In this case where the respondent alleged that his injury was proximately caused by failure of automatic couplers to couple automatically by impact and wherein there was no proof that the couplers prior to the alleged "impact" were properly set, was it error for the Court to instruct the jury as follows:

> "The Court further charges you that if couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically on impact, you may infer from that fact buf you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act."

Under the provisions of the Safety Appliances Act, a railroad employee who is injured as the proximate result of the failure of an automatic coupler to couple automatically on impact, where such coupler is properly set (i. e., the knuckles opened), may recover for such injuries from the defendant railroad and in such a situation, the defense of contributory negligence must be wholly disregarded. **Affolder v. The N. Y. C. & St. L. R. R.**, 339 U. S. 96 (1950); **Weakley v. Baltimore & O. R. R.**, 4 F. 2d 312 (6th Cir., 1925); **Chesapeake & O. Rlwy. v. Charlton**, 247 Fed. 34 (4th Cir., 1917). Petitioner here respectfully contends that if a railroad employee is to bring

himself within the protection of the absolute duty imposed by the Safety Appliances Act, and thereby to avoid whatsoever any diminution of his damages due to his own contributory negligence, he must establish, by a preponderance of the evidence that the coupler which failed to couple automatically upon impact was properly set prior to the impact.

Petitioner respectfully contends, therefore, that the charge aforementioned was in error because it states to the jury that they may infer, merely from the fact that the coupler failed to couple, that it was properly set. And that the error from such a charge was most harmful to the petitioner in the case at bar cannot be denied. Upon this entire record there is no proof whatsoever that the knuckles on any of the couplers involved in this case were ever opened. To permit the jury to infer that they were open, apart from direct probative evidence, had the effect of allowing the jury to bring into play the Safety Appliances Act in this case, thereby eliminating the question of mitigation of damages on the ground of contributory negligence.

Moreover, it is respectfully submitted, that nowhere in the entire charge of the Court is this error corrected.

It is true that the Court did give a general charge upon the issue of burden of proof (84a, 85a), at which time the Court stated that the burden of proof generally is on the plaintiff to show on the whole case that he is entitled to recover. But this portion of the charge dealing with burden of proof is not specifically related to the Safety Appliances Act, and, to the extent that it might be said to refer to such Act, is wholly inconsistent with the language of the charge quoted in the heading above.

In **Affolder v. New York, C. & St. L. R. R.**, 79 F. Sup. 365 (E. D. Mo. 1948), a railroad employee brought suit to recover damages sustained from the loss of a leg, said damages allegedly having been proximately caused by failure of an automatic coupler to couple automatically upon impact. On trial, positive evidence was introduced that the coupler in question had been opened prior to the impact by a "pin man" who worked for the railroad. Subsequently, the cars in question were kicked together and failed to couple, with the result that several cars started rolling down the track. The plaintiff, in an attempt to put the brakes on these cars, slipped and fell under the cars, losing his leg.

The trial Court charged the jury that if the separation of the cars in question was due to a failure on the part of the couplers of either car "to function properly and to couple automatically on impact", then the defendant railroad had violated the Safety Appliances Act. On the other hand, the Court also instructed the jury that if the separation of the cars "was due to some other cause, that a failure to provide couplers coupling automatically on impact did not cause it", then there would have been no violation of the Safety Appliances Act.

Following a verdict for the plaintiff, the defendant made a motion for judgment n. o. v. on the grounds that the Court's charge, in effect, deprived defendant of his theory of defense (i. e., that the failure to couple was due to the fact that the couplers were not properly opened) because the charge merely required plaintiff to prove that "any such coupler did in fact fail to couple automatically on impact". The trial Court overruled the motion, apparently, solely on the basis that the charge, considered as a whole, was sufficiently clear to inform the jury of the applicable rule of law. Specifically, however,

the Court did not discuss expressly the question of where the burden of proof lay. It held, merely, that the charge sufficiently informed the jury where the burden of proof lay.

The case was appealed and is reported at 174 F. 2d 486 (8th Cir. 1949). On the appeal, the 8th Circuit Court of Appeals reversed, holding that the charge had not been sufficiently clear. Specifically, the Court held:

> "The difficulty arises from the rather strong inference created by the charge that all the jury need find to reach a verdict for plaintiff was that the cars did separate. We are unable to escape the conclusion that the instruction was not sufficiently clear and definite in that respect. It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty and therefore could find this issue for plaintiff on evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes. Where reliance for the proof of the ultimate act rests entirely on circumstantial evidence, it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases, but is especially true in cases such as this where only one circumstance is relied upon to support the inference. Plaintiff's counsel made the argument to the jury that:
>
> > 'The plaintiff's duty is satisfied as long as you find that the couplers on this occasion, when put in position to operate properly, did not come together by impact. That is all there is to it insofar

as that particular phase of the case is concerned. I hope I make myself clear on that.'

"The instruction following that argument that under the law defendant had an absolute continuing duty not to use any car which was not equipped with couplers coupling automatically on impact and maintained in such operative condition that they *would always* perform their function, and that plaintiff was not required to prove more than that 'any coupler did in fact fail to couple automatically by impact,' very probably gave the jury the impression that since that was all plaintiff need show, it was all the jury need find. If it did get that impression, consideration of other possible causes for the separation was eliminated because it was undisputed that the couplers did not couple these two cars.

"The trial Court was of the opinion . . . that the injunction given to the jury, that it must find that the separation ('was due') to a failure on the part of the couplers of either car to function properly and to couple automatically, 'on impact', taken with the further charge that if the jury found that the separation was due to some other cause and that 'a failure to provide couplers coupling automatically on impact did not cause it,' was sufficient to prevent any misunderstanding. We are unable to agree. The initial reaction from the entire charge is an impression that all that was necessary for the jury to find to reach the conclusion that there was a violation of the Act was that there was a separation. The bare intercalation of the words, 'to function properly,' would not be likely to remove it . . . We are of the opinion that the jury could well have understood the charge taken as a whole to mean that since the couplers did

not couple automatically on impact, since defendant had the absolute duty to furnish cars with couplers that did do so, the fact that these did not do so conclusively established defendant's violation of its duty to furnish cars with couplers that did" (174 F. 2d at 491-492).

The case went finally to the United States Supreme Court on petition for certiorari, being reported at 339 U. S. 96 (1950). The Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, holding specifically that the charge of the trial court was sufficiently clear. The Supreme Court appeared to agree with the Circuit Court as to the substantive law, that is, that it would be improper to charge a jury that any time a coupler failed to couple it would constitute a violation of the Safety Appliances Act. It is believed that the only point that the Supreme Court sought to make was that the trial judge's charge in this regard was clear, whereas the Court of Appeals thought it confusing. That this was the only difference between the majority of the Supreme Court and the three judge Court of Appeals is made clear by Justice Jackson's dissenting opinion in the Supreme Court case wherein he said:

"The only issue surviving in this case is whether the charge gave the jury a sufficiently clear and correct knowledge of the law to be applied.

"The Court of Appeals thought the charge as a whole 'very probably gave the jury the impression' that it need only find that two cars failed to couple on impact to establish a violation of the Safety Appliances Act. This, as the Court recognizes, is not the law. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted as

such automatic couplers must be, of course, the failure is not that of the device. The instructions contained language quoted by this Court that would suggest this rule. Other language was used, however, which might well cancel the effect of that quoted. . . .

"If the charge seemed so foggy to a Court of Appeals, generally familiar with what the trial judge was driving at, I do not see how this Court can be so confident that it did not mislead a jury of laymen. That confidence is all upon which we reverse the judgment". (339 U. S. at 101-102).

It is respectfully contended by the petitioner in the case at bar that the **Affolder** case, properly considered, stands for the proposition that before a violation of the Safety Appliances Act can be established, the jury must find, not only that there was a failure to couple upon impact, but also that such failure was not due to the fact that the knuckles of the couplers were closed. Petitioner respectfully contends that the burden of proof with regard to both of these elements should be and is upon the respondent. It should be upon the respondent in conformity with the general rule that any party must always establish all the essential elements of his substantive case. We believe that it is upon the respondent, in view of the holding of the 8th Circuit Court of Appeals in **St. Louis S. W. Ry. v. Ferguson**, 182 F. 2d 949 (8th Cir. 1950). This case was decided following the decision of the Supreme Court in the **Affolder** case and was decided expressly with the **Affolder** case in mind. There, a plaintiff was injured in trying to adjust the knuckle of a coupler which had just failed to couple on impact. On the second impact, the plaintiff was knocked down and sustained the injuries for which he claimed damages. In that case, there was positive proof that the knuckles on both cars involved had been opened prior to the first impact.

and that thereafter the cars had failed to couple on impact. In affirming a judgment for the plaintiff, the Eighth Circuit Court of Appeals held specifically:

> "But under the O'Donnell, Carter and Affolder opinions, as well as the previous decisions of the Supreme Court read in their light, a Court may not declare that there has been no violation of the Act so as to take a case from the jury where there is substantial evidence, by direct testimony or on probative circumstances, that on the occasion of the accident a coupler had been duly opened but failed to couple automatically on impact—no matter how absolute is shown to have been the care of the railroad generally or how perfect the performance of the coupler otherwise. In such a situation it is for the jury to say whether the things which the plaintiff's proof shows as occurring constitute the fact; and the railroad's care and diligence, as well as the previous and subsequent working of the coupler, will only have relevancy as they may assist the jury in determining the facts of the accident. If the jury adopts plaintiff's view of the facts that the coupler on this specific occasion had been duly opened but failed to couple automatically on impact, then violation of the Act has been established and liability exists provided that the violation is also shown to have borne a causal relationship to the injury" (182 F. 2d at 952).

The Ferguson case clearly interprets the **Affolder** case to require the plaintiff in a Safety Appliance case to show that the knuckles were properly opened if he seeks to bring himself within the scope of the absolute duty imposed by the Act.

The opinion of the Court of Appeals in the instant case states in part:

"There is authority that a violation of the Act is shown by proof that cars failed to couple automatically by impact. **Southern Railway Co. v. Stewart**, 119 F. 2d 85, 87 (C. A. 8)."

Petitioner respectfully submits that the case of **Southern Railway Co. v. Stewart** is not authority for the proposition that a violation of the Act is shown by proof that cars failed to couple automatically by impact—unless there is a further showing that the couplers were set for coupling. The Court in the **Stewart** case does state a general proposition with which petitioner is in agreement, namely:

"It is generally held that a violation of the Statute is shown by proof that cars upon a fair trial failed to couple automatically by impact."

In the **Stewart** case the decedent, a switchman, was crushed when he stepped between two cars that were to be coupled. It was contended that it was necessary for him to step between the cars in order to open the knuckle of one of the couplers, inasmuch as the pin lifter lever which is designed to eliminate the necessity of going between cars to open a knuckle was inoperative. The proof on this point, however, was negative in that the engineer who was in a position to see the switchman testified that he did not see him attempt to use the pin lifter before going between the cars. The Court of Appeals, after pointing out that the burden of proof was on the plaintiff, ruled that an essential element of the case had not been proved, which in petitioner's view is similar to the state of the record in the instant case. The Court stated in part:

"* * * A very essential element is left to conjecture and speculation. * * * where proven facts give equal

support to each of two inconsistent inferences; * * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * *.' **Pennsylvania R. Co. v. Chamberlain,** 288 U. S. 333, 53 S. Ct. 391, 393, 77 L. Ed. 819; **Wheelock v. Freiwald,** 8 Cir., 66 F. 2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict cannot be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. **Midland Valley R. Co. v. Fulgham,** 8 Cir., 181 F. 91, L. R. A. 1917 E 1.

"There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict."

The United States Supreme Court granted certiorari and remanded the case for a new trial, stating:

"The petitioner insists that, in the absence of evidence on behalf of the respondent as to the condition of the coupler, the jury were entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler jaw by hand. The court below held the jury was not en-

titled to draw this inference in the absence of testimony by the foreman with respect to his efforts to use the pin lifter and as to its condition.

"We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject." **Stewart v. Southern Ry. Co.**, 345 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849.

It is stated in the opinion of the Court of Appeals in the instant case:

"The Court of Appeals for the Eighth Circuit in the case of **New York, C. & St. L. R. R. v. Affolder**, 174 F. 2d 486, at 488, stated:

"'The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with "couplers coupling automatically." That is the law.'"

The **Affolder** case differed materially in its facts from the present case in that there was positive testimony in the **Affolder** case that the coupler on one of the cars had been opened or set for coupling, whereas in the present case, testimony tending to prove this essential fact is totally lacking. The Supreme Court in affirming the **Affolder** case was not dealing with a situation where this material element was lacking for failure of proof.

In the **Affolder** case, the Court of Appeals, immediately following the language quoted above, cited the following:

> "* * * Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; Southern R. Co. v. Stewart, 8 Cir., 119 F. 2d 85; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995."

The case of **Southern R. Co. v. Stewart** is discussed above. In the **Chicago, R. I. & P. R. Co. v. Brown** case the Court's opinion states as a fact that the injured switchman attempted three or four times to use the pin-lifting lever before going between the cars where he was injured. Upon positive showing of failure of safety appliance equipment, a verdict was sustained. In the case of **Minneapolis & St. Louis R. Co. v. Gotschall** it appears as a conceded fact that the train separated because of the opening of a coupler, resulting in automatic setting of the brakes with the result that the deceased switchman was thrown from the top of the train.

CONCLUSION.

Petitioner respectfully submits that in none of the cases relied upon in support of the position of respondent was there a total absence of proof of an essential fact such as in the instant case in which there is no proof that either coupler was set for coupling. Under the substantive law the burden of proof was upon the respondent to offer some probative evidence of this fact in order to support a finding that the couplers failed to couple automatically by impact "upon a fair trial." This was not done.

Wherefore, petitioner respectfully prays that a Writ of Certiorari be issued directed to the United States Court of

Appeals for the Sixth Circuit in order that the matters outlined above may be further presented and considered.

Respectfully submitted,

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APPENDIX NO. 1.

No. 15,051.

United States Court of Appeals
For the Sixth Circuit.

J. R. Cobb,
Plaintiff-Appellee,
v.
Union Railway Company,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Tennessee, Western Division.

OPINION OF THE COURT OF APPEALS.

Decided May 24, 1963.

Before: Cecil, Chief Judge, Weick, Circuit Judge, and Taylor, District Judge.

Robert L. Taylor, District Judge. Plaintiff-Appellee, J. R. Cobb, obtained a verdict for $45,000.00 against Union Railway Company based on the Federal Safety Appliance Act (45 U. S. C., Sec. 2)[1] and multiple violations of the Federal Employers' Liability Act (45 U. S. C., Sec. 51, et seq.). The Railway Company appealed from the judgment entered on the verdict.

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[1] "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

All of the questions presented by the appeal relate to the Federal Safety Appliance Act. Defendant contends that the District Judge erred in a portion of his charge, and in refusing to charge its Special Requests Nos. 1 and 3.

The accident occurred in the early morning between 4:00 and 5:00 A. M. while the defendant's train crew was engaged in switching operations at its Parkway Yard in Memphis, Tennessee. Cobb's job was that of Yardmaster, but he assisted the train crew in switching operations at various times. This practice was not unknown to other yardmasters who worked for the Railway Company.

Cobb was injured while on top of a boxcar that was standing at the end of a cut of cars on a spur track located north of Olive Street in Memphis. The spur track is referred to in the record as "Whiskey Track" and runs in a curving and northeasterly direction from a main line track on which the defendant railroad operates its trains. The "Whiskey Track" was used for storage of cars and on the occasion of the accident ten cars were stored there. The car from which plaintiff was knocked was the last car of the ten, and was most distant from the junction of the "Whiskey Track" with the main track.

Prior to the accident, Cobb noticed that the brake on the last car of the ten was set. Realizing that the crew intended to move the last two cars of the ten cars stored on the "Whiskey Track" and switch them to the Pillsbury track and spot them at the Pillsbury plant, plaintiff decided to release the brake on the last car of these ten in order to prevent it from being damaged when the train started to move. The other members of the crew didn't know where plaintiff was, or that he intended to release the brake. The switch engine was run down the main track and then into the "Whiskey Track" and made contact with the lead car. The couple between the switch engine and the lead car was successful.

It was the crew's intention to pick up all the ten cars as shown by defendant's Answer and the testimony of the crewmen themselves. After the engine coupled with the first of the ten cars, one of the crewmen stationed himself at the Olive Street Crossing to count them as they passed and found that two of the cars were not attached to the train. The engineer was thereupon signaled that two of the cars were missing from the original ten and he returned to the "Whiskey Track" with the engine and the eight cars attached for the purpose of coupling the rear of the eight cars to the front one of the two that had been left. Cobb was standing near the rear of the second of the two cars at the time of the attempt to couple them with the other eight of the unit. He had his hands on the ladder or grabiron, awaiting the coupling of the cars before climbing to the top. After feeling the vibration which he stated was caused by an impact, he climbed on top of the car and knocked the brake off and then started back down. At that moment, the cars made another impact which knocked him from the top of the car to the ground. He stated that it was an everyday experience for him, over a period of forty years railroad service, to hold onto the ladders and grabirons of boxcars and that he believed the cars had coupled when he felt the vibration caused from the first impact.

Defendant's Special Request No. 1 was as follows:

> "Under the provisions of the Safety Appliance Act requiring that cars be equipped with couplers automatically coupling by impact, I charge you, Ladies and Gentlemen, that the word 'impact' as used in this context means impact at the point in the train where the couple is sought to be made. The word 'impact' does not extend to impact at any other point further on down a cut of cars from the point where the couple is sought to be made. In other words, if you find in

this case that there were, for example, two separate cuts of cars standing upon the 'Whiskey Track,' one of them consisting of six to eight cars, for example, the other cut consisting of, say, two to three cars, and if you further find that the switch engine in this case sought to couple with the first cut of cars, that is, the six to eight car cut, and in so doing, pushed this cut back into the second cut of cars, then there would be no failure to couple on impact where the couple was made between the engine and the first cut of cars, but was not made between the first cut of cars and the second cut of cars.''

In order to put the trial court in error for failing to charge as requested, the request must correctly state the applicable law. The jury could have concluded from the language in this request that plaintiff's entire case, as it related to the Federal Safety Appliance Act, turned on the question whether a proper coupling was made on the impact between the couplers on the engine and the first of the eight cars that were stored on the ''Whiskey Track.'' This was but one of the issues. Another was whether the engine properly coupled with the ten cars so as to move them as a unit and that thereafter the eighth and ninth cars separated because of a defect in the couplers.

As previously noted, defendant's Answer admitted that the crewmen intended to take all of the ten cars from the ''Whiskey Track'' at the time of the first movement thereby the switch engine. One or more of the crewmen testified that that was their intention and that they believed that they had joined all of the ten cars with the switch engine until the crewman stationed at the Olive Street Crossing discovered that two of them had been left behind.

The jury could have found that the couplers were properly set on the rear car of the eight cars and the front car

of the two cars and that they failed to automatically couple by impact due to defect in one or more of the couplers. Or, the jury could have found that the eight cars initially coupled with the two cars and thereafter uncoupled because of a defect in the couplers. In either event, the only issue that would remain was whether the failure to automatically couple upon first impact or the fortuitous uncoupling of the two cars was the proximate cause of plaintiff's injuries.

The Safety Appliance Act requires that cars remain coupled until freed by some purposeful act after a coupling is effected. **O'Donnell v. Elgin, Joliet & E. R. Co.**, 338 U. S. 384, 389.

If a violation is established, only the proximate cause of the injuries remains as an issue. **Carter v. Atlanta & St. A. B. R. Co.**, 338 U. S. 430, 434. If a violation is a contributory proximate cause of the injury, a jury may find for the plaintiff. *Ibid.*, 435.

We believe that the language of this request was too restrictive and did not contain an accurate statement of law as applied to the facts in our case.

Defendant further contends that the District Judge erred in charging the jury as follows:

> "The Court further charges you that if couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically on impact, you may infer

from that fact you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act."

Defendant contends that there was no basis for this portion of charge as there was no proof that the couplers were properly set and that the burden of proof was upon the plaintiff to show that the couplers were properly set before there could be a violation for failure to automatically couple upon impact.

More time was devoted to this point in the oral argument than to any other. The issue was whether the circumstance that the cars failed to couple automatically upon the initial impact of the second movement, the evidence of which circumstance was based on Cobb's testimony of the vibration that he felt while his hands were on the grabiron of the car, was a sufficient probative circumstance from which the jury could have inferred that the couplers were properly set but failed to automatically couple on the initial impact and automatically coupled on the second impact of this particular operation.

Another factor that could have been considered was whether there was an impact between these cars when the switch engine was first attached to the first eight of the ten. The record is not clear on the question whether the ten were attached when the engine started to move them and became separated in the first movement or failed to couple at all in the first impact in this operation. If there was such impact upon the first movement and eight and nine failed to automatically couple, then there were three impacts as contended by the plaintiff in his brief.

There were probative circumstances from which the jury could have inferred that the couplers were properly set on the first or second impact, or both, and did not auto-

matically couple upon either but successfully coupled on the third impact.

Each of the crewmen testified that he did not remember whether the couplers were properly set at the time of either of the impacts, except the impact that attached the switch engine to the first of the ten cars. It was the duty of the switchman to signal the engineer that the couplers were properly set before coupling. Since the impact was successful (whether the second or third), the jury could reasonably have inferred that the couplers were properly set but failed on the previous try (or tries) to automatically couple.

There is authority that a violation of the Act is shown by proof that cars failed to couple automatically by impact. **Southern Railway Co. v. Stewart**, 119 F. 2d 85, 87 (C. A. 8).

We think there were probative circumstances from which the jury could have drawn the inference that there were three impacts, that the couplers were properly set at the time of the second impact, or the first of the last movements of the train immediately before the accident, and that the cars failed to automatically couple upon that impact but successfully coupled on the third impact and that the District Judge was correct in giving this portion of the charge. **St. Louis S. W. Ry. v. Ferguson**, 182 F. 2d 949 (C. A. 8).

The Court of Appeals for the Eighth Circuit in the case of **New York, C. & St. L. R. R. v. Affolder**, 174 F. 2d 486, at 488 stated:

> "The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had vio-

lated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.' That is the law."

The Eighth Circuit was of the opinion that the trial court in his charge left the impression with the jury that failure of the car to automatically couple upon impact conclusively established defendant's violation of its duty to furnish couplers that would automatically couple upon impact. This portion of the charge and other portions led the Upper Court to believe that the trial judge deprived the Railroad of its defense that plaintiff failed to carry the burden by showing that the couplers were in a proper position for coupling at the time of impact. The Supreme Court reversed the appellate court and stated in substance that the charge was sufficient to permit a finding of the jury that the couplers were properly set at the time of impact and failed to automatically couple. **Affolder v. New York, C. & St. L. R. R.**, 339 U. S. 96, 99.

The District Judge in our case, in other parts of his charge, told the jury that the burden of proof was upon the plaintiff to show that his injuries were proximately caused by the defendant's violation of the Safety Appliance Act before there could be a recovery on this phase of the case and that the plaintiff was required to carry the burden by the preponderance of the evidence.

It is to be noted that the District Judge properly told the jury that they could not find a violation of the Act if the couplers failed to automatically couple if they were not properly set, but if they failed for any other reason then there would be a violation. Also, that if the couplers failed to couple automatically upon impact the jury could infer from that fact, but they were not required to infer, that the failure was under circumstances constituting a violation of the Act.

The teaching of the **Affolder** case is that this portion of the charge did not deprive defendant of its defense that plaintiff failed to carry the burden of proof by showing that the couplers were properly set at the time they failed to automatically couple. See: **O'Donnell v. Elgin, Joliet & E. R. Co.**, supra; **Carter v. Atlanta & St. A. B. R. Co.**, supra.

Finally, defendant complains of the denial of Request No. 3, which was in this language:

> "I further charge you, Ladies and Gentlemen, that the burden of proving that the failure to couple was not due to the fact that the coupler had not been properly opened, is upon the plaintiff. Therefore, if you find that the coupler in question, which allegedly failed to couple upon impact, was not open, or if you find that you are not able to determine whether such coupler was open without guessing at the matter, then you must find for the defendant, The Union Railway Company, on this phase of the case."

The District Judge told the jury in another part of his charge that if they found that the couplers failed to couple automatically because they were not properly set that such failure would not be a violation of the Act. This was an accurate statement of law and covered defendant's point made in Request No. 3.

A trial judge cannot be put in error because he failed to use the identical language contained in a request if his charge is in all other respects sufficient.

Flaws can be found in almost any charge by separating certain paragraphs from the whole. Thus, the charge must be considered as a whole to determine whether it gives the jury a correct understanding of the propositions which they are to decide and the pertinent principles of law

which shall guide them in their decision. **S. S. Kresge Co. v. McCallion**, 58 F. 2d 931, 934 (C. A. 8).

We think that the point made in Request No. 3 was sufficiently covered by the District Judge and that he did not err in his refusal to give such request.

We are satisfied that the charge as a whole correctly stated the relevant principles of law that were to guide the jury in their decision of the factual questions relating to the Federal Safety Appliance Act.

The judgment of the District Court is affirmed.

APPENDIX NO. 2.

No. 15,051.

United States Court of Appeals for the Sixth Circuit.

J. R. Cobb, Plaintiff-Appellee, v. Union Railway Company, Defendant-Appellant.	Appeal From the United States District Court for the Western District of Tennessee, Western Division.

ORDER DENYING PETITION FOR REHEARING.

Filed July 16, 1963.

Defendant-Appellant, Union Railway Company, has filed a petition for rehearing. The propositions urged in its support were considered by the Court in its original opinion at least in part.

It is asserted that the Court misconceived the facts in finding that there were three attempts at coupling in the ten-car cut of cars parked on the "Whiskey Track" when all of the evidence showed that there were only two attempts to couple these cars. This was the contention of Defendant-Appellant in the District Court. Plaintiff-Appellee contended that there were three attempts. Whether there were two or three attempts to couple is beside the point. The primary question was whether there was suffi

cient evidence to create circumstances from which the jury could infer that the couplers on the cars were properly set to automatically couple upon impact. This was a sharply contested issue. This Court is of the opinion that the evidence was sufficient to show circumstances from which the jury could have concluded that the couplers were properly set but failed to automatically couple upon impact, and were, therefore, defective, and that the defect in the couplers was the proximate cause of the accident and resulting injuries. True, the number of impacts was a factor for consideration of the jury in determining whether the couplers were properly set for automatic coupling upon impact.

The second ground of the motion is that this Court erred in affirming the action of the District Judge in refusing to charge Defendant-Appellant's Request No. 1. It is contended that there is no evidence in the record that the engine properly coupled with the ten cars, and that thereafter the cars separated because of a defect in the couplers. We do not agree. We believe that the circumstances were such as to justify the submission of this issue to the jury and that the District Judge did not err in refusing to charge Request No. 1.

The cases cited in the petition were considered by the Court in its original opinion and a further discussion of them at this time is not deemed necessary.

The petition for rehearing is denied.

Robert L. Taylor,
United States District Judge Sitting
by Designation.